**MOHAMED YAHAYA**

**v.**

**M. S. ALLY SDN. BHD. & ORS.**

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[ORIGINATING SUMMONS NO. C 137 OF 1983]
15 FEBRUARY 1984

***COMPANY LAW:*** *Offer to sell shares - Articles of Association of Company - Non-compliance with pre-emptive procedures for sale of shares in the Articles of Association.*

The plaintiff held 80,000 RM1 shares in M. S. Ally Sdn. Bhd., the Company. The plaintiff offered to sell his shares in the company pursuant to Article 27 of the Articles of Association which sets out the terms and Conditions of which shares may be transferred. The Company as agent of the vendor sought the auditors of the Company to determine the "fair value" of the shares in purported pursuance of Article 29 of the Articles of Association. The auditors stated that the "Net Tangible Asset value of a share of the Company was RM1.63". The plaintiff refused to accept the valuation by the auditors as being the "fair value" of the shares. The Company failed to furnish the plaintiff of the names of the 11 purchasers thus depriving the plaintiff of the opportunity of negotiating the fair value of the shares. The Company, nevertheless, went ahead to effect the transfer of 25,000 of the plaintiff's shares to the 11 purchasers.

The plaintiff's application before the Court is to determine whether the defendants have adhered to the requirements of the Articles of Association, failing which the Court should order the rectification of the register of the members of the Company by striking out the names of the 11 purchasers and replacing their names with that of the plaintiff.

**Held:**

**[1]** The scheme of the pre-emptive procedures for the sale of shares in accordance with Article 27, 29 and 30 of the Articles of Association were not followed by the Company;

**[2]** Thus the purported transaction of the said 25,000 shares at the "fair value" of RM1.63 per share was made without adherence to the requirements of the Articles of Association and accordingly had to be set aside;

**[3]** The register of members of the Company be rectified by striking out the names of the said 11 purchasers and replacing their names with that of the plaintiff.

*[Application granted with costs.]*

*For the plaintiff - V. Chandran; M/s. Shook Lin & Bok*
*For the defendants - R. Annarasa; M/s. Syarikat Annarasa*

**JUDGMENT**

**(On enclosure 1)**
**VC George J:**

At all relevant times the plaintiff held 80,000 RM1 shares in M. S. Ally Sdn. Bhd. He was anxious to sell the shares.

The Articles of Association of the Company provide the terms and conditions on which shares may be transferred and pursuant to Article 27 the plaintiff by his solicitors' letter of 21 September 1982 gave notice to the Company of his desire to sell his 80,000 shares. That letter did not specify the sale price which the Company treated as an omission and which omission was rectified by the plaintiff's solicitors' letter of 1 October 1982 which stated that the shares were to be sold at RM2.60 per share. The Court was informed that it was common ground that accordingly the effective date of the Article 27 notice was 1 October 1982.

Pre-emptive procedures laid down in the Articles of Association provide for the Company to try and obtain a qualified purchaser within 28 days of the receipt of an Article 27 notice to do which it was required to offer the shares to the persons then holding the remaining shares in the Company as nearly as may be in proportion to their holding of shares in the company, giving a time limit for acceptance so that in case the shares or some of them are not taken up, may be re-offered to such members who may be interested in them. The whole exercise was to be completed within the said 28 days. It was only when the Company was not able to find a buyer or buyers for the shares (within the 28 days) could the vendor look for a buyer (who could be an outsider) and he has 6 months from the expiry of the said 28 days to do so. After the six months if there are shares still not sold, to effect a sale of them the whole pre-emptive process has to be repeated.

The Company did not effect a sale of any of the shares within the 28 days of 1 October 1982 and it was left to the plaintiff to look for a buyer for which purpose he had 6 months from the 29 October 1982.

It would seem that some time after the expiry of that 6 months the plaintiff learnt that the directors of the Company would be interested in purchasing the shares. A written offer made by the plaintiff to the directors of the Company. That was the letter of 4 June 1983 written by the plaintiff's solicitors to the directors of Syarikat M.S. Ally Sdn. Bhd. by which the shares were offered at RM2.60 per share the purchase price to be paid as to 50% thereof "upon the sale of shares and the remaining 50% to be paid within a period of 30 days".

The directors by their solicitors' letter of 9 June 1983 made what was clearly a counter offer: They would buy the 80,000 shares the price to be "a fair value to be ascertained" to be paid by a deposit of RM40,000 "on the fair price being accepted" and the balance in monthly instalments of RM3,000 each. The Company followed the said counter offer by requiring the auditors of the Company to give their opinion of the fair value of the shares. This was purported to be done pursuant to "cl. 29 of the Articles of Association".

The solicitors for the plaintiff by their letter of 18 June 1983 obviously with the intention of removing any misunderstanding of the position obtaining at that stage reminded the solicitors for the Company (who had also acted for the directors of the Company) that the notice of 1 October 1982 had expired and was ineffective. By another letter also of 18 June 1983 the counter offer was rejected. By yet another letter of 18 June 1983 a new Article 27 notice was given. By a letter of 8 July 1983 the Company's solicitors sought the opinion of the auditors of the Company as to the "fair value" of the shares. By their letter of 9 July 1983 the auditors stated that the "Net Tangible Asset value of a share of the Company was RM1.63" and that that was based on the accounts of the Company for the accounting year that ended on 31 March 1982. By their letter of 15 July 1983 the auditors on being pressed to do so confirmed that RM1.63 in their opinion was the fair value within the meaning of cl. 29 of the Articles of Association but "based on the accounts as at 31 March 1982". By their letter of 15 July 1983 the Company's solicitors informed the plaintiff that the Board of Directors had found

11 members of the Company "who have come forward to buy 25,000 shares at RM1.63 per share". The purchase price at RM1.63 per share was deposited with the Company's solicitors and the plaintiff was required to deliver up the 25,000 share certificates. This the plaintiff refused to do. He refused to accept the valuation by the auditors as being the "fair value" of the shares. The Company nevertheless went ahead, purported to act pursuant to Article 30 and effected the transfer of 25,000 of the plaintiff's shares in favour of the persons who it was alleged had purchased the shares. It was only upon the plaintiff's solicitors by their letter of 22 August 1983 enquiring who those purchasers were that by a letter from the Company's solicitors received on 7 September 1983 the names of the 11 purchasers were made known to the plaintiff. On 19 September 1983 the instant originating summons was caused to be issued wherein the plaintiff seeks a rectification of the register of the members of the Company by striking out the names of the said 11 purchasers and replacing their names with that of the plaintiff and for orders consequential thereto.

In my judgment the purported transaction of the said 25,000 shares was made without adherence to the requirements of the Articles of Association and accordingly had to be set aside.

As has been seen, by Article 28 the Company acting as the agent of the vendor member should have, upon receipt of the Article 27 notice of 18 June 1983.

(i) First of all offered the shares to the other members of the Company in proportion to their shareholdings keeping the offer open for a specified limited period.

(ii) If the shares or any of them are not taken up on that offer they or the remaining of them should have been offered to the members without the imposition of any restriction on the number of shares that could be taken up.

(iii Both the above two steps should have been taken and completed within 28 days of the Company's receipt of that notice of 18 June 1983.

No evidence was led to show that these requirements were met. By s. 114(g) of the Evidence Act the presumption that arises is that the steps were not taken.

Article 29 provides for the obtaining of a valuation of the shares in the event that any difference arises between the vendor member and the purchasing member as to the fair value of shares. It follows that the negotiation of the purchase price is a matter to be left to the vendor and the individual purchaser concerned and it is for one or the other of them to seek the opinion of the auditor which could be done if and when the negotiations failed. It also follows that the Company having found purchasers for the shares should have forthwith provided the vendor with their identity to enable the vendor and the purchasers to complete the negotiations.

In my judgment the scheme of the pre-emptive procedures for sale of shares made it necessary for the offer for sale and acceptance of the offer to be made without a specification of the sale price. Both the vendor and the purchaser will be bound to complete the sale on the basis of a purchase price which shall be the fair value of the shares with a proviso that the parties may agree on what is the fair value - clearly they must be given the opportunity of arriving at an agreement on fair value.

What in fact transpired was that the pre-emptive procedures were ignored. The vendor and the purchasers were never given an opportunity of negotiating the purchase price. The Company obtained a figure from the auditors and sought to impose the figure on the parties as being the fair value.

Now, it is only what is certified by the auditor on the application of either party to a sale that will be deemed to be the fair value. What is certified on the application of other parties (including the Company or its directors) does not necessarily have to be deemed to be fair value for purposes of Article 30. Further Article 30 specifies that such an opinion by the auditor will be regarded simply as an expert's opinion and not a finding of fact by an arbitrator. I understand that provision to mean that the auditor's opinion can be subjected to scrutiny which in my judgment on the facts of the instant case it cannot stand. *Ex facie* the fair value of a share in a going concern, on or about June 1983, cannot be the net tangible asset value of the share as on 31 March 1982. Over a year had passed since 31 March 1982 and in any event fair value must surely be the sum of the net tangible asset value and the net value of the intangibles. The omission of the value of intangibles could be a serious omission. In a service oriented business for instance, the intangibles may be worth much more than the tangible assets. When the business has been long established it may enjoy a good will which is an intangible asset and which may be of considerable value.

In the event I had no hesitation in granting the application in the terms of prayers a), b) and c). I also provided for the costs of the application.

Also found at [1984] 1 CLJ 311